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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 322

U. S. HEALTH CLUB, INC., PETITIONER

v.

WILLIAM MAJOR, POSTMASTER, BERGENFIELD, NEW JERSEY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court is reported at 182 F. Supp. 759. The opinion of the court of appeals (Pet. 6-12) is reported at 292 F. 2d 665.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1961 (Pet. 13). The petition for a writ of certiorari was filed on August 16, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether under the Administrative Procedure Act and Reorganization Plan 3 of 1949 the Postmaster General may delegate his authority to render a final agency decision.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Administrative Procedure Act, 60 Stat. 237, as amended, 5 U.S.C. 1001, *et seq.;* Reorganization Plan No. 3 of 1949, 63 Stat. 1066 (following 5 U.S.C. 133z-15), and the regulations promulgated thereunder, 23 Fed. Reg. 2794, 2796; and the Act of July 14, 1960, 74 Stat. 554, are set out in the Appendix, *infra,* pp. 9-11.

STATEMENT[1]

On January 15, 1959, the Post Office Department instituted proceedings against petitioner, U. S. Health Club, Inc., charging that petitioner was conducting a fraudulent enterprise through the mails, in violation of 39 U.S.C. 259, in connection with the sale of two products, Super-Coronaid and Choless. Petitioner had claimed in its advertising that these two products, when used as directed, would prevent heart disease and hardening of the arteries.

A hearing was held before a trial examiner pursuant to the provisions of the Administrative Procedure Act, 60 Stat. 237, as amended, 5 U.S.C. 1001, *et seq.,* and the trial examiner recommended the issuance of a fraud order. The trial examiner's deci-

[1] The statement is based on the summary of the facts in the opinion of the court of appeals (Pet. App. 7, 10-11).

sion was based upon the testimony of Doctor Campbell, the only expert medical witness to testify, that it was the consensus of informed medical opinion that petitioner's representations as to the efficacy of its products were false. On appeal, the findings of the trial examiner were affirmed by the Judicial Officer of the Post Office Department and the Judicial Officer ordered the issuance of a fraud order. The Judicial Officer's authority to issue this final agency decision is based on Section 1(b) of Reorganization Plan No. 3 of 1949, 63 Stat. 1066 (following 5 U.S.C. 133z-15), *infra*, p. 10, which authorizes the Postmaster General to delegate his functions to employees of the agency, and on 23 Fed. Reg. 2794, 2796, Sec. 201.17, a regulation of the Postmaster General which authorized the Judicial Officer to render final decisions for the agency.

Petitioner then instituted this action in the District Court for the District of New Jersey to enjoin enforcement of the fraud order on the ground that the order was not supported by substantial evidence. Petitioner also argued that the Postmaster General could not delegate his authority to make a final agency decision under Section 8(a) of the Administrative Procedure Act, 5 U.S.C. 1007, *infra*, pp. 9-10, unless there was express statutory authorization for the delegation. Petitioner contended that Section 1(b) of Reorganization Plan No. 3 of 1949 was not such an authorization, relying upon *Borg-Johnson Electronics, Inc.* v. *Christenberry*, 169 F. Supp. 746 (S.D. N.Y.), which held that the Postmaster General could not delegate his authority to act as the initial trial examiner.

The district court enjoined enforcement of the order and held that the order was not supported by substantial evidence because the testimony of Doctor Campbell was a mere opinion as to the efficacy of the two products. The Court of Appeals for the Third Circuit reversed and held that the order was supported by substantial evidence—*i.e.*, the testimony of an expert medical witness that it was the consensus of medical opinion that Super-Coronaid and Choless would not prevent heart disease when used as directed. The court of appeals further held that the Judicial Officer had authority to render a final agency decision.

ARGUMENT

Petitioner seeks review solely of the question whether the Postmaster General lacked authority to delegate to the Judicial Officer his power to render a final agency decision in an administrative proceeding brought under the Administrative Procedure Act, 60 Stat. 237, as amended, 5 U.S.C. 1001, *et seq.* Petitioner does not deny that it received a full and fair hearing before the trial examiner who initially heard his case and determined that petitioner was conducting a fraudulent enterprise and before the Judicial Officer who affirmed that decision. Nor does petitioner now contend that the fraud order was not supported by substantial evidence.

Petitioner's theory is that Section 8(a) of the Administrative Procedure Act, 5 U.S.C. 1007(a) *infra*, pp. 9-10, provides that "the agency" shall have the power to review, on appeal, the decision of a hearing examiner, and that this provision of the Act cannot be

modified by subsequent legislation "except to the extent that such legislation shall do so expressly." Section 12, Administrative Procedure Act, 5 U.S.C. 1011 *infra*, p. 10; see *Marcello* v. *Bonds*, 349 U.S. 302; *Wong Yang Sung* v. *McGrath*, 339 U.S. 33. While recognizing that Section 1(b) of Reorganization Plan No. 3 of 1949, *infra*, p. 10, authorizes the Postmaster General to delegate "such of his functions as he deems appropriate," petitioner urges that this language is not sufficiently express to permit the Postmaster General to authorize the Judicial Officer to render the final agency decision under Section 8(a) of the Administrative Procedure Act, citing *Borg-Johnson Electronics, Inc.* v. *Christenberry*, 169 F. Supp. 746 (S.D. N.Y.). *Borg-Johnson* did not hold generally, however, that the procedures of the Administrative Procedure Act could not be modified by Section 1(b) of the Reorganization Plan. Instead, *Borg-Johnson* held that Section 1(b) was not specific enough to authorize the Postmaster General to delegate to his Judicial Officer his authority under Section 7(a), 5 U.S.C. 1006(a), to act as a hearing examiner, since "[t]he provisions for the appointment of impartial, independent Hearing Examiners are the very heart and soul of the Administrative Procedure Act * * *" (169 F. Supp. at 753) and such a delegation to an officer "under the direct supervision of the agency" "might avoid entirely the Hearing Examiner provisions" of the Act (*id.* at 754).

Delegation of authority to the Judicial Officer to make the final administrative decision does not, however, conflict with the basic purpose of the Act or jeopardize the right to a fair hearing. The distinc-

tion was clearly pointed out by the court below (Pet. App. 8-9):

> * * * [T]he hearing officer is the touchstone of the adjudicatory process, and the initial decision made by him "which may dispose of the case or be the statement of it from which appeal may be taken to the heads [should] carry a hallmark of fairness and capacity." The APA attempts to make hearing officers semi-autonomous and not, as had been charged in the past, "mere tools of the agency concerned and subservient to the agency heads in making their proposed findings of fact and recommendations." *Ramspeck* v. *Federal Trial Examiners Conference,* 345 U.S. 128, 131 (1953). No such special status was contemplated for those who make the final agency decision. Section 8(a) permits a reviewing official to make a final decision based on the record made before and screened by an independent hearing officer. As is readily apparent, a final decision under § 8 (a) is not, in any manner, similar to conducting a hearing. In addition, the plain words of that section do not require that the final decision be made only by those enumerated with particularity in § 7(a). The right of the Postmaster General to delegate his power to make a final decision is authorized by § 1(b) of Reorganization Plan No. 3 of 1949, 63 Stat. 1066, 14 Fed. Reg. 5225. Were it otherwise, the Postmaster General, the head of what has been described as the world's largest

> business, would be called on daily to make a great number of final decisions under § 8(a).

This distinction between a delegation of authority under Section 1(b) of the Reorganization Plan to act as a hearing examiner and a delegation to render a final agency decision has also been recognized in *United States Bio-Genics Corp.* v. *Christenberry*, 173 F. Supp. 645 S.D. N.Y., affirmed, 278 F. 2d 561 (C.A. 2), and in *Greene* v. *Kern*, 178 F. Supp. 201 (D. N.J.), where the courts upheld the Judicial Officer's authority to render the final agency decision.

Thus, the decision of the court below is clearly correct, and there is no conflict. Moreover, the question is not of continuing importance since any doubt as to the status of the Judicial Officer has now been conclusively resolved by statute. In 1960, after the institution of the administrative proceeding in this case, Congress passed a statute authorizing the Judicial Officer to act as "the agency for the purposes of the requirements of the Administrative Procedure Act * * * to the extent that functions are delegated to him by the Postmaster General." Act of July 14, 1960, 74 Stat. 554, *infra*, p. 11.[2]

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[2] One purpose of this legislation was to "remove all doubts as to the judicial officer's authority to render final departmental decisions. This authority has been questioned in proceedings now being litigated." H. Rep. No. 1493, 86th Cong., 2d Sess., p. 3.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1961.

APPENDIX

The Administrative Procedure Act, 60 Stat. 237, as amended, 5 U.S.C. 1001, *et seq.*, provides in pertinent part:

"Section 8 [5 U.S.C. 1007].

In cases in which a hearing is required to be conducted in conformity with section 1006 of this title—

(a) In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (*c*) of section 1004 of this title, any other officer or officers qualified to preside at hearings pursuant to section 1006 of this title) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers

may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

* * * * *

Section 12 [5 U.S.C. 1011].

* * * No subsequent legislatior shall be held to supersede or modify the provisions of this chapter except to the extent that such legislation shall do so expressly. * * *

Section 1 of Reorganization Plan No. 3 of 1949, 63 Stat. 1066 (following 5 U.S.C. 133z-15), provides:

(a) There are hereby transferred to the Postmaster General the functions of all subordinate officers and agencies of the Post Office Department, including the functions of each Assistant Postmaster General, the Purchasing Agent for the Post Office Department, the Comptroller and the Bureau of Accounts.

(b) The Postmaster General is hereby authorized to delegate to any officer, employee, or agency of the Post Office Department designated by him such of his functions as he deems appropriate.

23 Fed. Reg. 2794, 2796, provided in pertinent part:

§ 201.17 * * * The Judicial Officer is the officer duly authorized to render a final departmental decision for the Postmaster General. * * *

The Act of July 14, 1960, 74 Stat. 554, provides:

AN ACT

To create a judicial officer for the Post Office Department.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there shall be in the Post Office Department a judicial officer, who shall be appointed by the Postmaster General and who shall perform such quasi-judicial duties as the Postmaster General may designate. This officer shall be the agency for the purposes of the requirements of the Administrative Procedure Act, as amended (5 U.S.C. 1001 and the following), to the extent that functions are delegated to him by the Postmaster General.

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